COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Franklin W. Olin College of Engineering	)	**D.T.E. 01-95**

OPPOSITION OF FRANKLIN W. OLIN COLLEGE OF ENGINEERING TO MOTION OF BOSTON EDISON COMPANY, d/b/a NSTAR ELECTRIC, FOR AN EXPEDITED ORDER TO MAINTAIN STATUS QUO ANTE

Boston Edison Company, d/b/a NSTAR Electric ("Boston Edison" or "BECO") has brought a Motion for an Expedited Order to Maintain *Status Quo Ante* (the "Motion") during the pendency of this proceeding. *See* Motion, p. 1. In fact, however, far from maintaining the *status quo*, Boston Edison's Motion seeks to alter the *status quo* by requiring Petitioner Franklin W. Olin College of Engineering ("Olin College" or "Olin") affirmatively to disconnect from its temporary source of electric power and to remove any temporary facilities already in place, actions that Boston Edison recognizes would further require Olin affirmatively to arrange for temporary service from Boston Edison. Motion, pp. 2, 5 n. 5. Boston Edison also proposes to prohibit Olin from preparing in any way for the potential provision of permanent service from Wellesley Municipal Light Plant ("WMLP"). Motion, p. 2. Boston Edison seeks to do so, moreover, on an expedited basis, claiming such action is appropriate because of purported ongoing violations of G.L. c. 164 and because Olin might engage in further action in purported derogation of Boston Edison's exclusive franchise rights in Needham. Motion, pp. 13-14.

In fact, however, as shown below, there is no emergency warranting expedited treatment of the Motion. The temporary facilities of which Boston Edison complains have been

in place, and Boston Edison has been aware they have been in place, since at least November 2000. *See* Olin Response to Information Request BE-1-45. Boston Edison has never provided service to the area now being served by these temporary facilities. Hannabury Aff. ¶2.

Accordingly, far from maintaining the status quo, Boston Edison's Motion seeks in large measure to upset the status quo by requiring Olin to abandon its temporary facilities and incur the significant expense of arranging for temporary service from Boston Edison itself. The Department should reject this effort to drastically and unnecessarily alter the parties' positions during the pendency of the proceeding.

Moreover, to the extent, if any, that Olin may choose to prepare for the potential receipt of permanent electric service through WMLP, such action would not prejudice Boston Edison's position in this proceeding in the slightest.[1] The Department is fully capable of rendering a decision in this proceeding without regard to whether Olin has or has not taken any steps in this regard.

I. FACTS

The facts of this case have been generally set forth in Olin's Petition and the Affidavit of Mr. Hannabury. The statement of facts in the Motion largely just reiterate Olin's exposition of facts, so to that extent the Motion is accurate. However, some clarification is necessary.

As noted in the Petition and Affidavit, Olin is constructing a campus for a new full scholarship based college along the border of Wellesley and Needham in an area where

[1] As discussed below, the physical facilities of the temporary line as distinguished from those of the permanent line are entirely separate, so that BECO's concern is moot. There will simply be no advantage for the permanent facilities depending on whether the temporary line is in service or disconnected.

Wellesley Municipal Light Plan ("WMLP") had previously provided and continues to provide electric service to Babson College. WMLP's electric services in Needham historically to Babson and on a proposed basis to Olin are (or would be) delivered on real estate owned by the customer in Wellesley and delivered over private property and privately owned electric lines into Needham. *See* Response to Information Requests BE-1-1 and BE-1-5. Olin decided to pursue the WMLP option because of perceived reliability and economic efficiency reasons.

Notably, BECO ignores the fact that Olin's property straddles the town line and is in both Wellesley and Needham. BECO's efforts to cast Olin in a bad light[2], *i.e.*, because of Olin constructing temporary lines to take electric service during its construction phase from the WMLP system[3] are also misplaced because Olin is taking such service in Wellesley and carrying it over its own lines that cross no public ways. Olin submits that this is not inconsistent with the General Laws Chapter 164, as amended – at least until the Department addresses this issue of first impression, presumably in this case. *See* Section III. below.

Finally, as discussed below, there is a significant difference in an engineering, physical and capital sense, between temporary and permanent facilities. Olin has temporary facilities in place that constitute the point of Olin's taking of electric service in Wellesley, as described above. However, such fact in no way governs the ultimate permanent facilities that Olin

[2] To the extent Olin was unable to commit to BECO's requests for commitments regarding electric service simply shows a deliberate decisionmaking on a critical issue – not the "unclean hands" implied by BECO. Indeed, about one-half a year of time was lost due to BECO's inability to provide Olin answers on service reliability issues. *See* Olin Response to BE-1-29.

[3] As described in Olin's Response to Information Request BE-1-14, Olin currently has no direct relationship with WMLP. Rather, Olin's lines are connected to Babson switchgear in Wellesley. Nor is Babson distributing such electricity. Rather, consistent with the Babson-Olin relationship, Babson is providing an accommodation to Olin. *See also* Olin's Response to Information Request BE-1-34.

would install. The discovery filed already in this proceeding shows that the temporary and permanent facilities are entirely distinct.

II. LEGAL PRECEDENT MILITATES DECIDEDLY AGAINST GRANTING THE RELIEF SOUGHT

Boston Edison maintains that courts have a preference for maintaining the *status quo* pending the outcome of a dispute, citing Highland Tap of Boston, Inc. v. Boston, 26 Mass. App. Ct. 239, 243-44 (1988), and Moore v. Hillman, 1997 WL 277274, **3 (Mass. Super. 1997). Motion, p. 4. Boston Edison further maintains that the Department, too, has expressed its preference that the *status quo* be maintained pending the outcome of its proceedings, and has fashioned orders to achieve this goal, citing MCI Worldcom, Inc., D.T.E. 97-116-B at 10 (1999), and Boston Edison Company, D.P.U. 92-130-1, at 11 (1992). *Id*. In fact, the Department observed in MCI Worldcom that "interim relief is not a standard practice," D.T.E. 97-116-B at 10, and, as shown below, the particular interim relief sought here is highly unusual and inappropriate.

Taking at face value Boston Edison's assertions regarding maintaining the *status quo*, however, they actually militate against, rather than in favor of, granting the relief sought with respect to Olin's receipt of temporary electric service. As the foregoing recitation of facts makes clear, the facilities whereby Olin is receiving temporary electric service not only were in place at the time Olin filed its Petition but had been in place for approximately a year, as Boston Edison well knew. Accordingly, the *status quo* is and has been that Olin has been receiving its electric service through the temporary services, and maintaining the *status quo* requires that the Motion be denied in this respect.

Boston Edison also claims that maintaining the *status quo* is grounded on the notion that "[n]o party should have [its] position improved, or [its] rights prejudiced, while the underlying issue being litigated is under consideration by triers of fact," and that "[p]reserving the status quo ante allows courts, or in this case the Department, the opportunity to make informed decisions on complex issues without the risk of the rights of the parties before it shifting materially during the pendency of the proceeding." Motion, p. 5. Since the temporary service was in place long before Olin's Petition was filed, Boston Edison presumably is referring here to the possibility that Olin might take steps in preparation for the potential receipt of permanent service through WMLP.

First, even assuming Olin were to do decide to do so, such action would not improve its legal position. Olin has every confidence that the Department can and will decide this controversy on the merits. Indeed, any such action Olin might take would not render any more appropriate the relief it seeks through the Petition.[4]

Second, there is no other way Boston Edison even conceivably could be prejudiced by such preparations: Olin, and not Boston Edison, would be assuming the risk that such preparations would be for naught in the event Olin ultimately were required to take permanent service from Boston Edison. Indeed, and ironically, it is not Olin but rather Boston Edison that is seeking to improve its position during the pendency of the proceeding by asking the Department to force Olin to terminate and dismantle its current temporary service and to begin taking temporary service from Boston Edison, even before rendering a final decision that

[4] Of course, this does not diminish the cost advantage of the permanent WMLP option over the BECO option.

Boston Edison has the exclusive right to provide electric service to Olin. Fidelity to the principles that Boston Edison purports to espouse requires that this effort be rejected.

At bottom, Boston Edison's Motion, which seeks to have Olin affirmatively disconnect and dismantle its temporary facilities and, of necessity, begin taking temporary power from Boston Edison, seeks, in effect, interim relief not merely in the form of an injunction but in the highly disfavored form of a mandatory injunction. The standard for obtaining injunctive relief is well established. In order to prevail on a preliminary injunction motion, the moving party must demonstrate: (1) a substantial likelihood that it will prevail on the merits; (2) that it will suffer irreparable harm unless the injunction issues; and (3) that the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause to the non-moving party. See Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-17 (1980). In appropriate cases, the Court must also weigh the harm to the public interest. GTE Production Corp. v. Stewart, 414 Mass. 721, 723 (1993).

Courts have recognized that even a simple preliminary injunction, such as Boston Edison's attempt to have Olin refrain from any preparation for the potential receipt of permanent service from WMLP, is a "drastic" and "extraordinary" remedy. International Association of Machinists and Aerospace Workers v. Eastern Air Lines, Inc., 826 F.2d 1141, 1148 (1st Cir. 1987).[5] A mandatory injunction, which, as here, alters the *status quo* by commanding some affirmative act to be taken, is highly disfavored and is subject to heightened

[5] The Massachusetts Supreme Judicial Court has held that, because the Massachusetts Rules of Civil Procedure have been adopted in substantially the same form as the Federal Rules of Civil Procedure, it will give to the Massachusetts rules the same construction, "absent compelling reasons to the contrary or significant differences in content." Rolling Environmental Services, Inc. v. Superior Court, 368 Mass. 174, 179-80 (1975); *see also* Chavoor v. Lewis, 383 Mass. 801, 806 n. 5 (1981)("As a general principle, we apply to our rules of civil procedure the construction given to the cognate Federal rules.").

standards. Hence, the power is sparingly exercised and only when "extreme or very serious damage" would result from the denial of the injunction. *See* McNeil v. New England School of Law, 1994 Mass. Sup. LEXIS 592 (Suffolk Sup. Ct. 1994); *see also* Philip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir. 1997) (movant must show that he is clearly entitled to such relief or that "extreme or very serious damage" would result from the denial of the injunction); Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1319-20 (9th Cir. 1994)(mandatory injunction can only issue where all factors to be considered in issuing a preliminary injunction clearly favor the moving party); SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098-99 (10th Cir. 1991)(party seeking a mandatory injunction must show that the factors for a preliminary injunction "weigh heavily and compellingly in [its] favor"); Lewis v. General Elec. Co., 37 F.Supp.2d 55, 62-63 (D. Mass. 1999)(mandatory injunctions are disfavored and subject to heightened scrutiny).

Boston Edison cannot even come close to carrying this heavy burden. First, for the reasons set forth in section III, *infra*, Boston Edison has not shown it has a substantial likelihood of prevailing on the merits. To the contrary, it has a substantial likelihood of losing on the merits.

Second, Boston Edison cannot show that it will be irreparably harmed if the Motion is denied. Indeed, the only concrete harm that Boston Edison has even alluded to if the *status quo* is maintained and Olin continues to receive temporary power as before is lost revenues. *See* Motion, p. 12.[6] Harm that can be remedied through money damages, however, is not

[6] To the extent Boston Edison makes vague allusions to the importance of exclusive franchise rights to the restructuring of the utility industry and the existence of distribution companies, *see, e.g.*, Motion, p.14, Boston Edison has made no showing that these rights will be imperiled if Olin continues to receive temporary power as before pending the Department's decision.

irreparable and is therefore not a sufficient basis for issuance of an injunction. *See, e.g.*, Norfolk County Hospital v. Commonwealth, 25 Mass. App. Ct. 586, 593, *review denied*, 402 Mass. 1104 (1988); Westinghouse Broadcasting Co. v. New England Patriots Football Club, Inc., 10 Mass. App. Ct. 70, 72 (1980); K-Mart Corp. v. Oriental Plaza, 875 F.2d 907, 914 (1st Cir. 1989). The possibility that Olin might take action to prepare for the potential receipt of permanent service from WMLP does not, as shown above, prejudice Boston Edison. The Department can decide the legal issue without having to weigh costs incurred after filing of the Petition, if any. Therefore, such action would not render any more appropriate the granting of the relief sought through its Petition, and the risk that Olin might ultimately be required to take power from Boston Edison and that expenditures in this regard would be lost is wholly on Olin.

Third, and by contrast, the potential for harm to Olin in granting the Motion is significant. Notably absent from Boston Edison's Motion is any recognition of the cost and inconvenience to Olin of being forced affirmatively to switch from its current arrangement to temporary service through Boston Edison. Neither is there any recognition of, much less adequate assurances regarding, one of the principle reasons leading Olin to file its Petition seeking to receive permanent service through WMLP: the lack of sufficiently reliable service it has received from Boston Edison to date at the Olin administrative buildings that do receive (and will continue to receive)[7] their power through Boston Edison. As detailed in the Hannabury Affidavit, Olin's experience with Boston Edison to date has been that the quality of service available from Boston Edison is not adequate for Olin's purposes. Hannabury Aff. ¶3.

[7] To be clear, Olin's Petition does not seek authority to change the service for such buildings. *See* Hannabury Aff. ¶2.

The problems Olin has experienced to date include, on a persistent basis, a number of total power outages exceeding half an hour, flickering lights, and high and low voltage spikes outside the acceptable range. *Id*. Indeed, Olin administrative buildings experienced a total loss of Boston Edison power for about 45 minutes just last week, on January 27, 2002. See Attachment A. This level of service is simply unacceptable due to the disruption it would cause to Olin's educational and research functions. Hannabury Aff. ¶3. Boston Edison's efforts to remedy the problems to date have been insufficient. *Id*. It has provided Olin and the Department with no basis for believing that the temporary service it proposes to provide Olin – the sole discussion of which is relegated to three sentences in a footnote, *see* Motion, p. 5 n. 5 – would be any improvement over the insufficient service it has been providing to date, much less on a par with the temporary service Olin is now receiving.

Finally, Boston Edison cannot show that the public interest militates in favor of the relief it seeks. While Boston Edison argues that exclusive franchise rights are necessary to promote fairness to both distribution companies and customers, Boston Edison's argument that its exclusive franchise rights are being infringed is, as shown below, incorrect. *See* Section III, *infra*. Moreover, in the unlikely event that the Department does determine that Boston Edison has the exclusive right to provide electric service to Olin, this outcome is not imperiled by Olin's continued receipt of its current source of temporary power pending the Department's decision, nor would it be imperiled were Olin to assume the risk of preparing for the potential receipt of permanent power through WMLP. Indeed, there is no significant risk on BECO that results from a denial of its Motion. For that reason BECO's citation of the MCI Worldcom,

Inc., D.T.E. 97-116-B decision is inapposite.[8] By contrast, Olin is in the midst of its first year of providing a college education to 30 students on an all-scholarship basis. The public interest would be ill-served by forcing Olin to switch to interim service from Boston Edison's (especially where the evidence shows such service to lack sufficient reliability) and risking disruption of Olin's important educational and research mission, particularly at this sensitive stage of its existence.[9]

In sum, the Department should preserve the *status quo,* not by forcing Olin to terminate and dismantle its current temporary service and forcing it to switch to Boston Edison, but instead by leaving things as they are, and should not preclude Olin from wholly innocuous preparation for the potential receipt of permanent power from WMLP.

III. BECO HAS FAILED TO CARRY ITS HEAVY BURDEN TO SHOW THAT OLIN'S TAKING OF ELECTRICITY IN WELLESLEY IS IMPROPER

As discussed above, black letter law requires a party seeking the sort of extraordinary relief requested in this case by BECO to show a substantial likelihood of success on the merits. In essence, BECO must show very clearly in this case that BECO's franchise rights preclude Olin from taking electric service in Wellesley and transmitting that electricity over Olin-owned lines into Needham. BECO's argument, however, fails on several grounds. First, the language of the statute covers a situation other than the case at hand, because there is no third party providing distribution service in Needham. Second, the applicable statute does not

[8] Note that there the Department stated its order to be pursuant to the specific authority over interconnection agreements granted by the Telecommunications Act of 1996 §252(e)(1).

[9] First impressions are lasting impressions. Olin's goal of being a national leader in undergraduate entrepreneurial engineering education would be set back substantially by excessive electric outages. On the other hand,

mandate a reading that the relevant portion of Needham is the exclusive domain for electric distribution service by BECO. In fact, BECO's argument on that point yields the illogical result that Babson buildings served for years by WMLP, must be immediately cut off WMLP service and connected to BECO.[10] As discussed below, there are many reasons why the portion of Needham that is in dispute here should be served by WMLP. Finally, the policy reasons alluded to by BECO are not applicable here -- with respect to the new campus electric consumption that is at issue, Olin is not an existing customer that is trying to evade the regulatory scheme to avoid paying transition charges. In fact, Olin in no way caused, or benefited from, those costs that form the basis of transition charges.

BECO relies on G.L. c. 164 §1B(a) as the primary basis for its argument that the Department should prejudge this case and Olin's Petition and grant extraordinary relief to BECO. However, because no other person is providing distribution service within Needham, the statute is not applicable. Section 1 of Chapter 164 defines distribution service as "the delivery of electricity to the customer by the electric distribution company from points on the transmission system or from a generating plant at distribution voltage." As discussed in Section I., above, the only delivery of electricity within the Town of Needham to Olin's new campus is over Olin's own wires. Nor is Babson College violating the statute where all it is doing is accommodating Olin by letting Olin take electric service at the Babson switchgear in Wellesley without being carried or transmitted anywhere. Also, WMLP is not violating the statute because it is simply making deliveries of electricity to Babson and currently it has no

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unfortunately, Olin's first impression of BECO was not favorable (Hannabury Affidavit, ¶3) , which fact certainly contributed to the existence of this case.

[10] Perhaps there are BECO customers elsewhere in the same situation, where the neighboring utility would now have to reclaim service as well.

established relationship with Olin. *See* Olin's Response to Information Request BE-1-29. Thus, no person is violating that statute and there is no infringement upon any exclusive rights of BECO.

Further, G.L. c. 164 §1B(a) only states that distribution company service territories shall follow municipal boundaries "to the extent possible." BECO's arguments presume that the statute essentially states that a distribution company franchise area "follows municipal boundaries without exception, regardless of prior service to the area by a neighboring utility and regardless of the lack of service to the area by the distribution company in question and regardless of reduced engineering or economic efficiencies resulting from the distribution company serving that area it had previously not served." Of course, that is not what the statute says. Even if the Legislature were seeking to provide the result sought by BECO through a more general statement, it certainly could have done so by flatly granting exclusivity of franchise by municipal boundaries. However, the Legislature did not do that, so BECO's argument fails again. In fact, the Legislature may well have used the language of the statute to accommodate situations like that of Olin/Babson. Without that degree of flexibility, an anomalous result could result where a single customer (such as Babson) with building(s) in two service territories would have to divide its facilities usage along the municipal boundary regardless of physical or electric system practicalities.

Thus, the very statutory language relied upon by BECO, and referenced above, actually shows a recognition of a need to consider the facts of individual cases to a certain extent. One can hardly imagine a situation where the facts were more unique and more indicative of a need to apply the exception to the general rule of exclusive franchises for electric distribution

companies. Indeed, for this reason, BECO must fail in its arguments regarding the applicability of the cases cited in Olin's Petition. Although the Restructuring Act was a watershed event, where there is not a black and white statutory answer, those cases that considered various factors in determining what utility should serve a given customer, become useful and provide intelligent guidance.

Olin, in many ways a public interest institution, is relatively uniquely located on real estate along the edge of BECO's service territory with property in the undisputed service area of WMLP. In order to assure itself of sufficiently reliable service and, ultimately, to conserve some of its endowment to maximize its ability to provide full scholarship-based higher education, Olin has sought to take advantage of its location and take service from WMLP. This is neither a situation that will generally undermine electric distribution companies' exclusive distribution franchise rights, nor which will allow a customer to evade payment of transition charges which reasonably attach to that customer. Rather, this is a situation of a new customer seeking to take service from a provider that actually has much more efficient and historically sufficient bases for claiming the customer's property as subject to service from that prior municipal provider (WMLP). For all these reasons, (relative proximity of WMLP facilities, historical service by WMLP in the general area, Olin concerns over reliability of service, and significant cost savings, etc.), the Department certainly cannot grant BECO its requested relief, and ultimately the Department must grant the relief requested by Olin.[11]

Also, BECO's argument that Olin's decision to take electric service from WMLP is somehow an attempt to "transfer the legislatively imposed transition charges as approved by

[11] As noted in various other filings and orally at the pre-hearing conference, an expeditious issuance of an ultimate decision will be most helpful to all parties.

the Department from [itself] to other customers" is entirely misplaced. First, as Olin is not taking service at this time, it is not bearing any BECO transition charges, so it is impossible for it to "transfer" such charges "to other customers." Notably in this context, should Olin ultimately take its electric service from WMLP, that action will not serve to increase the cost responsibility of BECO's customers. If this case were about a large existing customer, for whom BECO had historically made generation investments resulting in stranded costs, and that customer (*e.g.* Northeastern University) sought to obtain distribution service from another provider, then BECO's customers would be negatively impacted and BECO's argument might hold some water. However, that is not the case here. Further, BECO's argument assumes that Olin prospectively would be obliged to bear some of the transition costs as a mandated customer of BECO. That issue, however, is for the Department to decide in this case and it certainly does not make sense to decide that issue at the beginning of the proceeding before a record is developed and final legal arguments are made.

Additionally, BECO implies that without granting the relief BECO seeks, electric distribution companies would face not infrequent and disruptive "border war" disputes. In reality, the Department has only faced such issues a handful of times over the last two decades and very few of those cases would be controlled by a decision in this case -- even if the Department did not seek to limit a decision in this case to its facts. Many of such cases involved existing end-use customers, in contrast to this situation where the load in question is purely incremental. Indeed, the unique circumstances of this case (as described above) are not likely to be replicated elsewhere. The Department can certainly limit any decision in this case (as it has for other similar cases) to the specific facts of the case.

IV. THE IMMEDIATE RELIEF SOUGHT SHOULD BE DENIED

While Boston Edison tries its best to conjure up an emergency, *see* Motion, pp. 13-14, its efforts fail because, of course, no such emergency exists. Boston Edison was aware for at least a year prior to the filing of Olin's Petition that Olin was getting its temporary power from a source other than Boston Edison and chose to do nothing about it. The Petition itself, which was filed on November 8, 2001, makes this plain, yet Boston Edison waited almost three months before bringing the Motion. Boston Edison's claims that there are serious, ongoing violations of G.L. chapter 164, the Restructuring Act, and the Department's regulatory policies, and that there is a risk of further such violations occurring, all fail for the reasons set forth above. Boston Edison's further claim that expedited action is necessary is belied by its own actions, or lack thereof.

V. CONCLUSION

For the foregoing reasons, the Department should deny Boston Edison's Motion and request for expedited hearing and should grant Olin College such other and further relief as the Department deems just and appropriate.

Respectfully submitted,

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